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17 UNITED STATES DISTRICT COURT

18 NORTHERN DISTRICT OF CALIFORNIA

19 SAN JOSE DIVISION

20  
21 FINJAN, INC., a Delaware Corporation,

22 Plaintiff,

23 v.

24 BLUE COAT SYSTEMS LLC, a Delaware  
Corporation,

25 Defendant.  
26

Case No.: 15-cv-03295-BLF-SVK

**BLUE COAT SYSTEMS LLC'S  
NOTICE OF MOTION AND PARTIAL  
RENEWED RULE 50(B) MOTION FOR  
JUDGMENT AS A MATTER OF LAW**

**TABLE OF CONTENTS**

	<b>Page</b>
I. INTRODUCTION .....	1
II. LEGAL STANDARD .....	1
III. NO LITERAL INFRINGEMENT OF THE '844 PATENT .....	2
A. Finjan Failed to Provide Evidence That the Accused Products Identify Suspicious Code. ....	2
B. Finjan Failed to Provide Evidence That the Accused Products Link a Downloadable Security Profile to a Downloadable Before a Web Server Makes the Content Available to Web Clients. ....	4
IV. NO LITERAL INFRINGEMENT OF THE '494 PATENT .....	6
V. NO INFRINGEMENT UNDER THE DOCTRINE OF EQUIVALENTS .....	8
VI. NO WILLFUL INFRINGEMENT OF THE '844 AND '494 PATENTS .....	10
VII. NO WORLDWIDE DAMAGES ON THE '844 AND '494 PATENTS .....	12
VIII. CONCLUSION .....	15

**TABLE OF AUTHORITIES****Page(s)****Cases**

<i>Centillion Data Sys. LLC v. Quest Commc'ns Int'l</i> , 631 F.3d 1279 (Fed. Cir. 2011).....	13
<i>Consolidated Edison Co. v. NLRB</i> , 305 U.S. 197 (1938) .....	2
<i>Eolas Techs. Inc. v. Microsoft Corp.</i> , No. 99 C 626, 2003 U.S. Dist. LEXIS 13482 (N.D. Ill. Aug. 1, 2003) .....	13
<i>Finjan, Inc. v. Cisco Sys.</i> , Case No. 17-cv-00072-BLF, 2017 U.S. Dist. LEXIS 87657 (N.D. Cal. June 7, 2017) .....	11
<i>Fr. Telecom S.A. v. Marvell Semiconductor Inc.</i> , 39 F. Supp. 3d 1080 (N.D. Cal. 2014) .....	13
<i>Halo Elecs., Inc. v. Pulse Elecs., Inc.</i> , 136 S. Ct. 1923 (2016) .....	10, 11
<i>Headwaters Forest Defense v. County of Humboldt</i> , 240 F.3d 1185 (9th Cir. 2000), <i>vacated on other grounds</i> , 534 U.S. 801 (2001).....	1
<i>Honeywell Int'l Inc. v. Universal Avionics Sys. Corp.</i> , 347 F. Supp. 2d 114 (D. Del. 2004) .....	8
<i>Johnson v. Paradise Valley Unified Sch. Dist.</i> , 251 F.3d 1222 (9th Cir. 2001).....	2
<i>Kalitta Air, LLC v. Cent. Tex. Airborne Sys.</i> , No. C 96-2494 CW, 2005 U.S. Dist. LEXIS 43317 (N.D. Cal. Jul. 22, 2005).....	1
<i>Lear Siegler, Inc. v. Sealy Mattress Co.</i> , 873 F.2d 1422 (Fed. Cir. 1989).....	9
<i>Microsoft Corp. v. AT&amp;T Corp.</i> , 550 U.S. 437 (2007) .....	13, 14
<i>Monolithic Power Sys., Inc. v. Silergy Corp.</i> , 127 F. Supp. 3d 1071 (N.D. Cal. 2015) .....	11
<i>Morrison v. Nat'l Australia Bank Ltd.</i> , 561 U.S. 247 (2010) .....	14
<i>NTP, Inc. v. Research in Motion, Ltd.</i> , 418 F.3d 1282 (Fed. Cir. 2005).....	13

1	<i>Power Integrations, Inc. v. Fairchild Semiconductor Int'l, Inc.</i> ,	
2	711 F.3d 1348 (Fed. Cir. 2013).....	14
3	<i>Radware, Ltd. v. F5 Networks, Inc.</i> ,	
4	Case No. 5:13-cv-02024-RMW, 2016 U.S. Dist. LEXIS 112504 (N.D. Cal.	
5	Aug. 22, 2016) .....	11
6	<i>Research Corp. Techs., Inc. v. Microsoft Corp.</i> ,	
7	No. CV-01-658-TUC-RCJ, 2009 U.S. Dist. LEXIS 135255 (D. Ariz. 2009) .....	14
8	<i>Streck, Inc. v. Research &amp; Diagnostic Sys.</i> ,	
9	665 F.3d 1269 (Fed. Cir. 2012).....	12
10	<i>Texas Instruments, Inc. v. Cypress Semiconductor Corp.</i> ,	
11	90 F.3d 1558 (Fed. Cir. 1996).....	9, 10
12	<i>TI Group Auto. Sys. (N.A.) v. VDO N.A., LLC</i> ,	
13	C.A. No. 00-432-GMS, 2002 U.S. Dist. LEXIS 17783 (D. Del. Sep. 4, 2002),	
14	<i>aff'd</i> 375 F.3d 1126 (Fed. Cir. 2004) .....	1
15	<i>Vectren Commc'n Servs. v. City of Alameda</i> ,	
16	No. C 08-3137 SI, 2011 U.S. Dist. LEXIS 35523 (N.D. Cal. Mar. 22, 2011).....	2
17	<i>Volterra Semiconductor Corp. v. Primarion, Inc.</i> ,	
18	799 F. Supp. 2d 1092 (N.D. Cal. 2011) .....	2
19	<i>Zoltar Satellite Alarm v. Snaptrack, Inc.</i> ,	
20	No. C 01-20291 JW, 2004 U.S. Dist. LEXIS 27713 (N.D. Cal. July 26, 2004).....	1, 2
21	<b>Statutes</b>	
22	35 U.S.C. § 101 .....	15
23	35 U.S.C. § 271(a) .....	13
24	<b>Rules</b>	
25	Fed. R. Civ. P. 50(a).....	9
26	Fed. R. Civ. P. 50(b) .....	1

**TABLE OF ABBREVIATIONS**

Plaintiff Finjan, Inc.	Finjan or Plaintiff
Defendant Blue Coat Systems LLC	Blue Coat or Defendant
U.S. Patent No. 6,154,844	'844 patent
U.S. Patent No. 8,677,494	'494 patent
U.S. Patent No. 6,965,968	'968 patent
U.S. Patent No. 7,418,731	'731 patent
Malware Analysis Appliance	MAA
Dynamic Real Time Rating	DRTR
Global Intelligence Network	GIN
<i>Finjan, Inc. v. Blue Coat Systems LLC</i> , No. 13-cv-03999-BLF (N.D. Cal. filed Aug. 28, 2013)	<i>Blue Coat I</i>
<i>Finjan, Inc. v. Blue Coat Systems LLC</i> , No. 13-cv-03999-BLF, Claim Construction Order, Dkt. No. 118	BC I CC Order
<i>Finjan, Inc. v. Blue Coat Systems LLC</i> , No. 15-cv-03295-BLF (N.D. Cal. filed July 15, 2015)	<i>Blue Coat II</i>
<i>Finjan, Inc. v. Sophos, Inc.</i> , No. 14-cv-01197-WHO (N.D. Cal.)	<i>Sophos</i>

**NOTICE OF MOTION**

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that at the Court's earliest convenience, or as soon thereafter as the matter may be heard by the Honorable Beth Labson Freeman in Courtroom 3, United States District Court for the Northern District of California, Robert F. Peckham Federal Building, 280 South 1st Street, San Jose, CA 95113, Defendant Blue Coat shall and hereby does respectfully seek an order granting judgment as a matter of law.

This motion is based on this notice of motion and supporting memorandum, the trial record, and such other written or oral argument as was presented and may be presented at or before the time this motion is taken under submission by the Court.

**RELIEF REQUESTED**

Blue Coat respectfully seeks an order granting it judgment as a matter of law on Finjan's remaining claims for infringement, willful infringement, and worldwide damages.

Dated: December 8, 2017

MORRISON & FOERSTER LLP

By: /s/ Stefani E. Shanberg  
Stefani E. Shanberg

Attorneys for Defendant  
BLUE COAT SYSTEMS LLC

## I. INTRODUCTION

A hung jury does not alter the Court's ability to grant judgment as a matter of law. *See, e.g., Zoltar Satellite Alarm v. Snaptrack, Inc.*, No. C 01-20291 JW, 2004 U.S. Dist. LEXIS 27713, at \*6 (N.D. Cal. July 26, 2004) ("The jury did not reach a verdict on the claim. . . . The Court finds that pursuant to Federal Rule of Civil Procedure 50, Defendants are entitled to judgment as a matter of law on this infringement claim."). A retrial on the '844 and '494 patents is a waste of Court and party resources, because Finjan failed to introduce sufficient evidence for a reasonable jury to find infringement as to those patents. There was little disagreement about the facts and the functionality of the accused products; rather, the parties focused on whether that undisputed functionality meets the claim limitations, as construed by the Court. *See generally TI Group Auto. Sys. (N.A.) v. VDO N.A., LLC*, C.A. No. 00-432-GMS, 2002 U.S. Dist. LEXIS 17783 (D. Del. Sep. 4, 2002) (reversing jury's infringement findings under 50(b) based on comparison of undisputed functionality to claim terms and noting that plaintiff's "arguments are effectively an end-run around the court's rejection" of claim construction positions), *aff'd* 375 F.3d 1126 (Fed. Cir. 2004). Finjan also failed to introduce substantial evidence of willfulness or worldwide damages. Finjan is not entitled to a second attempt to meet its burden of proof. Blue Coat respectfully requests that the Court deny Finjan's remaining claims for relief as a matter of law.<sup>1</sup>

## II. LEGAL STANDARD

Judgment as a matter of law is appropriate when "a party has been fully heard on an issue during a jury trial and the court finds that a reasonable jury would not have a legally sufficient evidentiary basis to find for the party on that issue." Fed. R. Civ. P. 50(b). The Court may grant judgment as a matter of law on claims where the jury was deadlocked. *Headwaters Forest Defense v. County of Humboldt*, 240 F.3d 1185, 1197 (9th Cir. 2000), *vacated on other grounds*, 534 U.S. 801 (2001); *see, e.g., Kalitta Air, LLC v. Cent. Tex. Airborne Sys.*, No. C 96-2494 CW,

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<sup>1</sup> In light of the Court's guidance that the parties may wait until after the retrial to file Rule 50(b) motions, *see* Hr'g Tr. (11/21/17) at 16:6-9, Blue Coat has limited this motion to those issues that would obviate or narrow the scope of a retrial and has not included issues such as noninfringement of the '731 and '968 patents or other damages issues.

2005 U.S. Dist. LEXIS 43317, at \*9 (N.D. Cal. Jul. 22, 2005) (On 50(b) motion, “[t]he fact that a mistrial was declared because of jury deadlock does not alter the standard to be applied.”); *Zoltar Satellite Alarm*, 2004 U.S. Dist. LEXIS 27713, at \*6. Indeed, the Court may grant JMOL anytime a party fails to support its burden with substantial evidence. *Johnson v. Paradise Valley Unified Sch. Dist.*, 251 F.3d 1222, 1227 (9th Cir. 2001) (citations omitted). “Substantial evidence is more than a scintilla of evidence.” *Vectren Commc’n Servs. v. City of Alameda*, No. C 08-3137 SI, 2011 U.S. Dist. LEXIS 35523, at \*5 (N.D. Cal. Mar. 22, 2011) (citing *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)). While the Court “must view the evidence in the light most favorable to the non-moving party . . . and draw all reasonable inferences in [its] favor,” “conclusory expert assertions do not give rise to a genuine issue of material fact.” *Id.* at 1062; *Strech, Inc. v. Research & Diagnostic Sys.*, 665 F.3d 1269, 1290-91 (Fed. Cir. 2012) (upholding district court’s grant of JMOL); *see also Volterra Semiconductor Corp. v. Primarion, Inc.*, 799 F. Supp. 2d 1092, 1098 (N.D. Cal. 2011) (“When an expert opinion is not supported by sufficient facts to validate it in the eyes of the law, or when indisputable record facts contradict or otherwise render the opinion unreasonable, it cannot support a jury’s verdict.”) (internal citations omitted).

### III. NO LITERAL INFRINGEMENT OF THE ’844 PATENT

#### A. Finjan Failed to Provide Evidence That the Accused Products Identify Suspicious Code.

Claim 15 of the ’844 patent, the Court’s claim construction, and the jury instructions require that “[a]s used in the patent, ‘code’ and ‘operations’ are not the same.” JTX-3001 (’844 patent) at 11:64-66; BC I CC Order at 17; Dkt. No. 428, at 47. No reasonable jury could find infringement of the ’844 patent based upon the evidence presented by Finjan, entitling Blue Coat to judgment as a matter of law of noninfringement.

At counsel’s repeated prompting, Dr. Cole ignored the claim requirements and stated that “operations” are “the same thing” as suspicious code. *See, e.g.*, Trial Tr. (Cole) at 521:11-14 (“Q. And the suspicious operations, is that the same thing as identifying suspicious code? A. Yes.”); 527:5-7 (“Suspicious operations and suspicious code are both the same thing and it’s in the file and looking for what actions the code would take that could be harmful.”). Dr. Cole pointed to



1 only one alleged downloadable security profile: MAA reports. *See, e.g., id.* at 520:5-521:10,  
2 522:2-523:7, 527:8-528:8 (discussing PTX-368, PTX-564, and PTX-427). In describing the  
3 contents of the MAA reports, Dr. Cole stated only that they list suspicious *operations*, not code.  
4 *See, e.g., id.* at 521:7-10 (“But these are all suspicious operations. So Blue Coat’s own document  
5 is showing you that it generates, it looks for and attracts these suspicious operations which forms  
6 the security profile.”); *see also*, 522:17-20; 527:21-528:8. Finjan failed to present any evidence  
7 that the accused products provide a downloadable security profile that identifies suspicious code.

8 Finjan now focuses on Dr. Cole’s assertion that “suspicious operations map back to the  
9 code that actually performs those functions.” *Id.* at 521:15-16. Whether or not correct, that is  
10 insufficient for infringement. The Court addressed this issue in its claim construction order,  
11 recognizing Blue Coat’s “concern that ‘identifies’ is too vague and could be interpreted to permit  
12 the downloadable security profile to simply detect the *presence of suspicious code* without  
13 further specifying its location or characteristics” and determining that “[t]his concern is well  
14 taken, and the Court agrees with Blue Coat that the patent requires the downloadable security  
15 profile (‘DSP’) to include *details about the suspicious code* in the received downloadable.” *Id.*  
16 (emphasis added). It is undisputed that Dr. Cole did not point to any “details about the suspicious  
17 code in the received downloadable.”

18 As Dr. Seth Nielson, Blue Coat’s technical expert, explained in reference to the exemplary  
19 MAA report that Dr. Cole used in his testimony, none of the results listed in the MAA report  
20 identify code because “there’s a lot of different ways, maybe an infinite number of ways, of  
21 writing code that can all cause the same event.” Trial Tr. (Nielson) at 1621:6-1622:12. The mere  
22 fact that *some* code must have existed to cause an operation does not mean that one has identified  
23 that code, much less details about that code, upon identifying an operation, as there would be  
24 innumerable different code that could lead to any given operation. *See id.*

25 Finjan attempted to buttress Dr. Cole’s testimony by questioning Dr. Nielson and Mr.  
26 Rohan, a principal developer on MAA, with MAA reports that Dr. Cole never discussed. These  
27 attempts fail because *no* MAA reports identify suspicious code. The cross discussed certain  
28 MAA reports that list “Javascript: Eval method,” “JavaScript: Unescape function,” and similar

1 events observed during analysis. *See, e.g.*, Trial Tr. (Nielson) at 1770:22-1773:1 (discussing  
 2 PTX-575); Trial Tr. (Rohan) at 1484:19-1485:8 (discussing PTX-575). Mr. Rohan stated that  
 3 those functions are not considered suspicious by MAA—no JavaScript functions identified by  
 4 MAA are considered suspicious. Trial Tr. (Rohan) at 1488:23-1489:17. Mr. Rohan explained  
 5 that the JavaScript functions identified by MAA are performed by “a lot of the legitimate  
 6 programs,” so these functions are ranked as risk score “6” or below, while MAA only considers  
 7 risk scores of “7” and above to be suspicious. *See id.* at 1476:4-25 (“1 through 6 are behaviors  
 8 that are not suspicious.”); 1485:7-1486:1, 1489:12-14; PTX-368 at BC2-0003663 (table of risk  
 9 scores for MAA and GIN showing that only “7” and above is “Suspicious behavior”). Absent  
 10 any contradictory testimony—or any testimony at all—from Dr. Cole on JavaScript functions  
 11 identified by MAA, Finjan has failed to present any evidence that MAA reports identify  
 12 suspicious code, as required by the ’844 patent and this Court’s claim construction.

13 **B. Finjan Failed to Provide Evidence That the Accused Products Link a**  
 14 **Downloadable Security Profile to a Downloadable Before a Web Server**  
**Makes the Content Available to Web Clients.**

15 Claim 15 of the ’844 patent also requires “linking the first Downloadable security profile  
 16 to the Downloadable *before a web server* makes the Downloadable available to web clients,”  
 17 which the Court construed as requiring linking “*before a non-network gateway web server* makes  
 18 the Downloadable available to web clients.” ’844 patent at 11:64-12:2 (emphasis added). In  
 19 construing this term, the Court recognized the arguments made by Finjan to obtain issuance of the  
 20 ’844 patent and “that the ’844 Patent contemplates a distinction between web servers and network  
 21 gateways.” BC I CC Order at 18-19 (citation to prosecution history omitted).

22 As discussed by Dr. Nielson, “a non-network gateway web server makes the  
 23 Downloadable available” by publishing it on the internet. Trial Tr. (Nielson) at 1609:19-1610:1.  
 24 Examples of a “non-network gateway webserver” given during trial were espn.com and cnn.com.  
 25 *See* Dkt. 429. This is consistent with an explicit embodiment in the patent in which a  
 26 downloadable is inspected and linked to its security profile before it is published by the web  
 27 server. *See* ’844 patent at Fig. 6; Trial Tr. (Nielson) at 1784:1-1788:2.

28 In order for any Blue Coat product to inspect a file, that file must have already been made

1 available by a web server. *See, e.g.*, Trial Tr. (Cole) at 486:25-487:3 (“So what will happen is  
 2 GIN will take the samples from the Internet and run them in a sandbox environment.”); *see also*,  
 3 *id.* (Mitzenmacher) at 626:14-19. Blue Coat’s products are not non-network gateway web  
 4 servers, and they do not link a downloadable security profile to a downloadable before a web  
 5 server makes that downloadable available. *Id.* (Nielson) at 1613:7-13 (“The way the Blue Coat  
 6 product works is that there’s been a request for that content, that content has already been made  
 7 available.”).

8 Rather than provide any evidence contradicting these facts, Finjan attempted to avoid this  
 9 issue by reading the word “web server” out of the claim and arguing that linking before a  
 10 ***particular Blue Coat customer*** could access information constituted linking “before a web server  
 11 makes the Downloadable available to ***web clients***.” It is undisputed that the Blue Coat products  
 12 have no effect on whether the web server from which they downloaded a file for inspection has  
 13 made and will continue to make that file available for web clients (plural). Dr. Cole glossed over  
 14 this distinction by repeatedly changing the claim language to “the web client” (singular) in order  
 15 to imply that one must focus on a particular Blue Coat customer. *See, e.g.*, Trial Tr. (Cole) at  
 16 485:20-21 (“[T]hat has to be linked to the downloadable before it’s made available to ***the client***.”)  
 17 (emphasis added); *see also* 487:21-23, 498:16-18, 500:24-501:2, 501:5-9, 517:24-518:2, 528:18-  
 18 529:8, 530:14-17, 533:13-25, 535:2-11, 536:11-16, 536:24-537:2. Finjan attempted again to  
 19 rewrite the claim when cross examining Dr. Nielson, but he pointed out the distinction and  
 20 corrected Finjan’s misreading of the claim. Trial Tr. (Nielson) at 1690:5-1691:15.

21 Relying on passive voice and stating that the content “is made available,” in over 50  
 22 transcript pages, Dr. Cole mentioned the web server only once: when reading the claim language.  
 23 *Id.* (Cole) at 479:13-539:9. This is a critical omission, as the claim requires a web server that  
 24 takes action. Failing to explain the role of the web server in the claim eviscerates the Court’s  
 25 construction and the patentee’s disclaimer on which it is based. As Dr. Nielson explained, “[i]f  
 26 you’ve got a web server that is making content available, right, just because there is a Blue Coat  
 27 product that may decide to block it for some clients, that doesn’t change the fact that the  
 28 webserver is already making it available. . . . The fact that an intermediary device is deciding to

1 block it doesn't change when that publishing happens." Trial Tr. (Nielson) at 1612:25-1616:5.

2 Dr. Cole's presentation of argument and purported evidence that ignores the claim  
3 language and this Court's constructions cannot sustain Finjan's burden of proof, and no  
4 reasonable jury could rely on it to find infringement of these claim elements. Blue Coat is  
5 entitled to judgment of noninfringement as a matter of law.

#### 6 **IV. NO LITERAL INFRINGEMENT OF THE '494 PATENT**

7 Claim 10 of the '494 patent requires the accused system to derive security profile data of a  
8 downloadable, including "a list of suspicious computer operations that may be attempted by the  
9 Downloadable." JTX 3006 ('494 patent) at 22:10-13; Trial Tr. (Cole) at 546:14-22. Finjan  
10 accused only the "Cookie2" string produced during DRTR inspection of meeting this limitation,  
11 specifically through its two fields that correspond to 1) a count of how many YARA rules were  
12 triggered, and 2) a concatenated string of the labels of those YARA rules. Trial Tr. (Cole)  
13 593:23-594:25. Neither is a list of suspicious computer operations. Based on this evidence, no  
14 reasonable jury could find infringement of claim 10 of the '494 patent.

15 YARA rules are a popular open source tool used to scan files to match text strings. *Id.* (C.  
16 Larsen) at 1540:22-1541:14; *id.* (Nielson) at 1600:19-1601:11. A YARA rule tests for text  
17 strings that *may implicate* a particular suspicious computer operation, but even then, the label for  
18 the YARA rule does not state what the operation is. For that reason, a string of YARA rule labels  
19 does not identify a suspicious computer operation. A count of how many rules were triggered is  
20 not a list of suspicious computer operations that might have caused them to trigger.

21 But Finjan's attempt to shoehorn the Cookie2 string into the asserted claim language has  
22 even more flaws. YARA rules often search for multiple different text strings and fire if any are  
23 found in a file. *See* PTX-516. Knowing that a rule fired therefore does not indicate whether a  
24 particular string is present in the file. Trial Tr. (C. Larsen) at 1546:8-21. Even if one were to  
25 assume that a particular YARA rule corresponded to one particular text string, that does not mean  
26 that when the YARA rule fires, a suspicious operation is present. "YARA rules are about text  
27 matching. They match text." Trial Tr. (Nielson) at 1601:12-14. As Dr. Nielson explained, "it all  
28 goes back to what a YARA rule is about. A YARA rule is about finding pattern matches . . . . It's

1 about finding patterns in text . . . . The YARA rule is not identifying any operations.” *Id.* at  
2 1600:6-12. A YARA rule would fire even if the matched string appears in displayed text or a  
3 comment rather than the page code. A web page describing an attack in its text could trigger a  
4 YARA rule hit even though there is no suspicious operation in the file, because the YARA rule is  
5 merely “looking for that text. It’s not looking for the operation.” *Id.* at 1601:5-14.

6 Dr. Cole’s unsubstantiated testimony is not evidence and is insufficient to support a  
7 different conclusion. Dr. Cole testified that “a concatenated string of the labels of the YARA  
8 rules that were fired” was “a list of those suspicious operations that were found within the file.”  
9 Trial Tr. (Cole) at 551:24-552:6. But he could not explain how particular YARA rule names  
10 comprise a list of suspicious computer operations.

11 Dr. Cole pointed to only two specific YARA rules used by Blue Coat, both of which  
12 demonstrate the flaws with Finjan’s infringement theory. First, Dr. Cole identified a rule called  
13 “generic\_javascript\_obfuscation.” stating that “this is JavaScript obfuscation detection.” Trial Tr.  
14 (Cole) at 548:19-549:25; PTX-516 at 61. But the label “generic\_javascript\_obfuscation” is not  
15 the name of a suspicious operation—“obfuscation” refers to the manner in which code is written,  
16 not what it is programmed to do—and, as discussed above, a list that includes this label would not  
17 be a “list of suspicious computer operations.” *See* Trial Tr. (Cole) at 486:8-12 (obfuscation is  
18 “where the adversary tries to hide or cover up what they did”). And, as Dr. Cole admitted, this  
19 rule searches for three separate strings, Trial Tr. (Cole) at 549:13-25, and fires when **any** of them  
20 are matched. *See id.* (C. Larsen) at 1543:11-1546:21 (“We would know that this rule fired, but  
21 that wouldn’t tell us, well, which pattern did we see? . . . . So I wouldn’t know which string it  
22 found.”); *id.* (Nielson) at 1599:23-1601:14 (“[T]here were multiple strings that could match, so  
23 even there you wouldn’t know which one of those matches fired, which pattern fired.”); PTX-516  
24 at 61 (“condition: any of them”). When asked about this rule on cross-examination, Chris Larsen,  
25 the architect of DRTR and WebPulse, reiterated that while a label for the rule would be stored in  
26 a database, “that’s not going to tell you which pattern within the rule actually triggered.” Trial  
27 Tr. (C. Larsen) at 1554:9-1556:16. Dr. Cole did not address this fact and identified no rules that  
28 correspond to a particular operation.

1 The only other rule to which Dr. Cole referred was “Unknown\_JS\_Injection\_Patrik1.”  
 2 PTX-516 at 155; Trial Tr. (Cole) at 550:3-21. Dr. Cole provided only a single conclusory  
 3 statement regarding the search performed by this rule: “And this also is injection, which is  
 4 another type of suspicious operation that we would want to look for.” Trial Tr. (Cole) at 550:20-  
 5 21. Dr. Cole did not explain why injection would be a suspicious computer operation that may be  
 6 attempted by the downloadable. It is not. In fact, this rule does not even belong to the “malware”  
 7 category of YARA rules. *See id.* (C. Larsen) at 1543:25-1544:2; PTX-516 at 155 (showing that  
 8 “Unknown\_JS\_Injection\_Patrik1” has no assigned category and a confidence rating of 5).  
 9 Neither of the rules discussed by Dr. Cole supported his opinion that YARA rule labels comprise  
 10 a list of suspicious computer operations. In light of Dr. Nielson’s uncontroverted opinion  
 11 explaining why YARA rule labels cannot comprise a list of suspicious code, Dr. Cole’s single  
 12 conclusory statement regarding this rule cannot provide sufficient evidence that it meets the  
 13 requirements of claim 10 of the ’494 patent. Because Finjan presented no evidence that the  
 14 functionality it accused of infringing claim 10 of the ’494 patent actually meets the claim  
 15 language, no reasonable jury could have found literal infringement, and Blue Coat is entitled to  
 16 judgment of noninfringement as a matter of law.

## 17 **V. NO INFRINGEMENT UNDER THE DOCTRINE OF EQUIVALENTS**

18 Finjan failed to provide the jury with a legally sufficient basis for finding infringement of  
 19 the ’844 patent or the ’494 patent under the doctrine of equivalents. Finjan’s doctrine of  
 20 equivalents theories failed for the same reasons discussed with respect to literal infringement.  
 21 The technology that Finjan cites is fundamentally different than what the ’844 and ’494 patent  
 22 claim elements require, as discussed above.

23 Finjan’s theories also failed because Finjan simply bootstrapped its arguments to its literal  
 24 infringement evidence, which the Federal Circuit has consistently held cannot satisfy a patentee’s  
 25 evidentiary burden. *Honeywell Int’l Inc. v. Universal Avionics Sys. Corp.*, 347 F. Supp. 2d 114,  
 26 119 n.21 (D. Del. 2004) (An expert “cannot simply boot-strap his conclusions with respect to  
 27 literal infringement and extend them to the infringement under the Doctrine of Equivalents.”)  
 28 (citing *Lear Siegler, Inc. v. Sealy Mattress Co.*, 873 F.2d 1422, 1425 (Fed. Cir. 1989)). An



1 equivalents argument “cannot merely be subsumed in plaintiff’s case of literal infringement” and  
 2 must be established by “particularized testimony and linking argument as to the insubstantiality of  
 3 the differences between the claimed invention and the accused device or process.” *Texas*  
 4 *Instruments, Inc. v. Cypress Semiconductor Corp.*, 90 F.3d 1558, 1566-68 (Fed. Cir. 1996)  
 5 (upholding grant of JMOL regarding doctrine of equivalents where “overwhelming majority of  
 6 [expert’s] testimony . . . was solicited for purposes of establishing literal infringement.”). Finjan  
 7 did not provide any such particularized testimony here.

8 As the Court recognized in hearing Blue Coat’s Rule 50(a) motion for judgment as a  
 9 matter of law on this point, “the testimony on DOE was rather skinny throughout [Finjan’s] case.”  
 10 *Id.* at 1364:13-14. Finjan’s equivalents testimony on each patent consisted of only a conclusory  
 11 argument that a single element was met under the function/way/result test (Trial Tr. (Cole) at  
 12 538:8-539:9 (’844 patent); 552:18-553:20 (’494 patent)), repeating the same argument recited for  
 13 literal infringement. *Compare, e.g., id.* at 528:14-529:1 (’844 literal infringement discussion of  
 14 linking to downloadable), *with id.* at 538:12-16 (’844 doctrine of equivalents discussion of linking  
 15 to downloadable); *compare id.* at 551:24-552:15 (’494 literal infringement testimony regarding  
 16 security profile and list of suspicious operations), *with id.* at 553:4-16 (’494 doctrine of  
 17 equivalents testimony regarding same). Rather than presenting and supporting the doctrine of  
 18 equivalents as a theory on its own merits, or even referring back to generally applicable technical  
 19 background testimony, Finjan merely presented Dr. Cole’s theory on each patent as a fallback to  
 20 its literal infringement arguments. *See, e.g., id.* at 538:8-9 (“So does GIN, **at the very least**, does  
 21 GIN function in the same way as the second element of claim 15?”), 559:11-13 (“And **at the very**  
 22 **least**, does GIN function in the same way – function in such a way that would be substantially  
 23 similar to the third element of claim 10 of the ’494 patent?”) (emphases added).

24 Dr. Cole’s doctrine of equivalents testimony was so thoroughly “subsumed in [Finjan]’s  
 25 case of literal infringement” that he testified the alleged ’844 equivalent is “exactly what GIN  
 26 FRS with sandboxing does,” and that the alleged ’494 equivalent provides “exactly the  
 27 functionality and output of the second claim element.” *Texas Instruments*, 90 F.3d at 1566-68;  
 28 Trial Tr. (Cole) at 539:7-9, 553:4-10. Finjan presents only conclusory evidence supporting this

1 theory and fails to provide the requisite “linking argument as to the insubstantiality of the  
 2 differences between the claimed invention and the accused device or process.” *Texas*  
 3 *Instruments*, 90 F.3d at 1566-68.

4 The only non-conclusory testimony on this issue confirms that the accused product  
 5 features are not equivalent to the missing claim elements. Dr. Nielson explained the test he  
 6 applied and walked through his analysis of both patents in detail, discussing the purpose and  
 7 nature of the claims and where key differences arose. Trial Tr. (Nielson) at 1626:12-1630:5  
 8 (testimony on ’844 patent), 1601:15-1604:8 (testimony on ’494 patent). As to the ’844 patent,  
 9 Dr. Nielson addressed both aspects of the principle disputed limitation. First, he explained why  
 10 identifying suspicious operations is distinct from identifying suspicious code due to the potential  
 11 ameliorative actions available in each scenario. *Id.* at 1627:1-1628:8. Second, Dr. Nielson  
 12 discussed why performing security profile linking at a web server is not equivalent to doing so at  
 13 a gateway due to policy-setting abilities and limiting the distribution of malware. *Id.* at 1628:13-  
 14 1630:5. As to the ’494 patent, Dr. Nielson concluded that because the claims are focused on  
 15 predicting what a downloadable is going to do, “whereas the YARA rules are focused on  
 16 signature matching and identifying previously identified malware . . . that has already been  
 17 identified . . . . The functions are different.” *Id.* at 1602:11-20.

18 Because Finjan’s equivalents allegations fail as a matter of law, the Court should grant  
 19 judgment of noninfringement off the ’844 and ’494 patents under the doctrine of equivalents.

## 20 **VI. NO WILLFUL INFRINGEMENT OF THE ’844 AND ’494 PATENTS**

21 To prove willful infringement, Finjan must show that Blue Coat’s behavior was egregious,  
 22 such as where infringement is malicious, deliberate, consciously wrongful, or done in bad faith.  
 23 *See Halo Elecs., Inc. v. Pulse Elecs., Inc.*, 136 S. Ct. 1923, 1932-33 (2016). Finjan did not  
 24 present evidence that came close to this standard. Because Finjan did not introduce evidence  
 25 sufficient for a reasonable jury to find willful infringement of the ’844 or ’494 patent, the Court  
 26 should grant Blue Coat judgment as a matter of law of no willful infringement. Supporting the  
 27 reasonableness of Blue Coat’s position, the *Blue Coat II* jury assessed Finjan’s evidence—which  
 28 was identical across all patents—and found no willful infringement of the two patents that it



1 found infringed, both of which were asserted in *Blue Coat I*.

2 Finjan’s primary argument at trial—that Blue Coat did not make a good faith effort to  
3 avoid infringing after the verdict in *Blue Coat I*—is unavailing. The *Blue Coat I* verdict was a  
4 lump sum award to compensate Finjan for Blue Coat’s infringement for the life of the **now-**  
5 **expired** ’844 patent, to which the **now-expired** ’494 patent is terminally disclaimed. At best,  
6 Finjan can only recover for new functionality but Finjan presented no evidence to contradict Blue  
7 Coat’s reasonable belief that it did not infringe the asserted patents, or that Blue Coat’s decision  
8 not to design around after the *Blue Coat I* verdict establishes willfulness. As such, it was  
9 reasonable for Blue Coat to believe that it was allowed to continue providing its products. *See*  
10 Trial Tr. (Schoenfeld) at 1404:22-1405:4; 1406:7-1408:7. That Blue Coat did not design around  
11 expired patents for which it had already been assessed lump sum damages is not evidence of  
12 willfulness, and there is no question that Blue Coat has the right to practice the patents today.

13 Further, the *Blue Coat I* verdict occurred **after** the filing of the *Blue Coat II* complaint,  
14 and is therefore of limited, if any, relevance to willfulness in *Blue Coat II*. *Radware, Ltd. v. F5*  
15 *Networks, Inc.*, No. 5:13-cv-02024-RMW, 2016 U.S. Dist. LEXIS 112504, at \*20-21 (N.D. Cal.  
16 Aug. 22, 2016) (noting that “post-complaint conduct is of limited relevance” and that *Halo* did  
17 not change this principle); *Monolithic Power Sys., Inc. v. Silergy Corp.*, 127 F. Supp. 3d 1071  
18 (N.D. Cal. 2015). And the ’494 patent was not at issue in the first case. At most, Finjan can  
19 show that Blue Coat was **aware** of the asserted patents prior to the filing of *Blue Coat II*, but mere  
20 awareness of a patent is insufficient to establish willfulness as a matter of law. *See, e.g., Finjan,*  
21 *Inc. v. Cisco Sys.*, Case No. 17-cv-00072-BLF, 2017 U.S. Dist. LEXIS 87657, at \*14-15 (N.D.  
22 Cal. June 7, 2017) (dismissing willful infringement claim because pre-suit knowledge of patents  
23 and infringement is insufficient) (quoting *Halo*, 136 S. Ct. at 1936 (“[T]he Court’s references to  
24 ‘willful misconduct’ do not mean that a court may award enhanced damages simply because the  
25 evidence shows that the infringer knew about the patent and nothing more.”) (Breyer, J.,  
26 concurring)).

27 The other exemplary factors in the Court’s jury instruction on willful infringement further  
28 support Blue Coat, not Finjan. Finjan did not present substantial evidence that Blue Coat acted

1 inconsistently with the standards of behavior for its industry. The sum total of Finjan's purported  
 2 evidence on this point was Dr. Cole's expert vouching regarding the unreasonableness of Blue  
 3 Coat's conduct after the *Blue Coat I* verdict, but that testimony does not constitute substantial  
 4 evidence. *Strech*, 665 F.3d at 1290-91 (conclusory expert assertions insufficient to prevent  
 5 JMOL). Dr. Cole's assertion that a company's only two options when it is "aware of an  
 6 infringement claim" are to take a license or to change its products, Trial Tr. (Cole) at 562:6-11, is  
 7 contrary to well-established legal principles permitting accused infringers to defend against  
 8 infringement claims without an automatic finding of willfulness.

9 Finjan also has no evidence that Blue Coat copied any product covered by any asserted  
 10 patent. *See* Dkt. No. 381 at 8 ("Finjan presents no evidence or argument that specifically tie the  
 11 features that Blue Coat allegedly copied to these asserted claims"). Nor is there any evidence of a  
 12 "cover up." To the contrary, Finjan's evidence regarding Blue Coat's competitive analysis of  
 13 Finjan's products shows standard industry practice that cannot establish willfulness. Trial Tr.  
 14 (Schoenfeld) at 1421:23-1422:7. As the Court recognized when evaluating Finjan's purported  
 15 evidence of copying pre-trial, competitive analysis is not unlawful. *See* Dkt. No. 381 at 8 (noting  
 16 that "acquisition and testing of [Finjan technology] seems largely focused on comparing features  
 17 and performance to see which is more desirable for customers" and that this "seem[s] consistent  
 18 with regular, competitive behavior"); *see also Blue Coat I*, Dkt. No. 543 at 27 (noting that "[i]n  
 19 any competitive industry, businesses monitor and discuss their competitors").

20 No reasonable jury could conclude based on the evidence Finjan presented that Blue Coat  
 21 willfully infringes the '844 and '494 patents. Blue Coat is entitled to judgment of no willful  
 22 infringement as a matter of law.

## 23 **VII. NO WORLDWIDE DAMAGES ON THE '844 AND '494 PATENTS**

24 The Court instructed the jury that "[i]n regard to users outside the United States, you may  
 25 award damages only if you find that Finjan has proved that each of the claim elements of an  
 26 Asserted Claim is made and combined in the United States. The law presumes that United States  
 27 patent law does not apply extraterritorially." Dkt. No. 428 at 39. Blue Coat objected to inclusion  
 28 of this instruction and continues to believe that whether Finjan is entitled to worldwide damages

1 is a question of law for the Court. *See* Trial Tr. (Jury Instruction Conference) at 1705:13-18. But  
 2 this issue should now be finally resolved because no reasonable jury could “find that Finjan has  
 3 proved that each of the claim elements of an Asserted Claim is made and combined in the United  
 4 States.” The Court and the jury heard the sum total of Finjan’s evidence regarding foreign use of  
 5 Blue Coat’s products. Finjan should not be allowed another attempt at doubling its damages with  
 6 chants of “Made in the USA”—when that is not even the standard. Judgment of no foreign  
 7 damages should be entered.

8 To recap, “[i]t is the general rule under United States patent law that no infringement  
 9 occurs when a patented product is made and sold in another country.” *Microsoft Corp. v. AT&T*  
 10 *Corp.*, 550 U.S. 437, 441 (2007) (no infringement under § 271(f) for master disks **and electronic**  
 11 **transmissions** copied abroad); *Fr. Telecom S.A. v. Marvell Semiconductor Inc.*, 39 F. Supp. 3d  
 12 1080, 1099-1103 (N.D. Cal. 2014) (applying *Microsoft*’s reasoning in context of § 271(a)). The  
 13 Supreme Court draws no distinction between software and physical components for determining  
 14 whether actions abroad qualify as infringement. *Microsoft*, 550 U.S. at 453 (“The only true  
 15 difference between making and supplying software components and physical components [of  
 16 other patented inventions] is that copies of software are easier to make and transport.”).

17 “The situs of the infringement is wherever an offending act of infringement is committed”  
 18 and “is a purely physical occurrence.” *NTP, Inc. v. Research in Motion, Ltd.*, 418 F.3d 1282,  
 19 1317 (Fed. Cir. 2005) (internal citations omitted). “Under Section 271(a), there is a requirement  
 20 that there be an ‘operable assembly’ of the infringing products here before there can be liability.”  
 21 *Eolas Techs. Inc. v. Microsoft Corp.*, No. 99 C 626, 2003 U.S. Dist. LEXIS 13482 at \*3 (N.D. Ill.  
 22 Aug. 1, 2003) (internal citations omitted); *see also Centillion Data Sys. LLC v. Quest Commcn’s*  
 23 *Int’l*, 631 F.3d 1279, 1288 (Fed. Cir. 2011) (“In order to ‘make’ the system under § 271(a),  
 24 [Defendant] would need to **combine all of the claim elements** – this it does not do. The  
 25 customer, not [Defendant], completes the system by providing the ‘personal computer data  
 26 processing means’ and **installing the client software.**”) (emphasis added).

27 For software, as the Supreme Court found in *Microsoft*, manufacture requires the final  
 28 copy of the software that is installed on the end users’ computer. *Microsoft*, 550 U.S. at 457-59.

1 Compiling software in the United States is not enough to find infringement under § 271(a). *See*  
 2 *Research Corp. Techs., Inc. v. Microsoft Corp.*, No. CV-01-658-TUC-RCJ, 2009 U.S. Dist.  
 3 LEXIS 135255, at \*59 (D. Ariz. 2009) (“**Software by itself cannot infringe** the apparatus claims.  
 4 Direct infringement of a device, product, apparatus or system claim occurs only when that person  
 5 **actually makes . . . the apparatus containing each and every limitation of the claim.**”). Both the  
 6 Federal Circuit and the Supreme Court have forcefully applied the presumption against  
 7 extraterritoriality in patent contexts. *Microsoft*, 550 U.S. at 454-55 (“The presumption that  
 8 United States law governs domestically but does not rule the world applies with particular force  
 9 in patent law.”); *see Power Integrations, Inc. v. Fairchild Semiconductor Int’l, Inc.*,  
 10 711 F.3d 1348, 1371-72 (Fed. Cir. 2013) (“[T]he presumption against extraterritorial application  
 11 would be a craven watchdog indeed if it retreated to its kennel whenever **some** domestic activity  
 12 is involved in the case”) (quoting *Morrison v. Nat’l Australia Bank Ltd.*, 561 U.S. 247 (2010))  
 13 (emphasis in original).

14 Other than repeated reliance on the incorrect standard regarding benefit and control—  
 15 which has been rejected by the Court—the only evidence Finjan provided at trial in support of its  
 16 alleged entitlement to damages based on worldwide users is the assertion that GIN is developed  
 17 and compiled in the United States. *See, e.g.*, Trial Tr. (Cole) at 536:7-10 (testifying GIN is  
 18 developed in Draper, Utah); *id.* at 597:17-19; *id.* (Mitzenmacher) at 765:3-12 (same); *id.*  
 19 (Medvidovic) at 982:22-983:13, 1052:2-21 (same); *id.* at 889:9-23 (Counsel reading RFAs  
 20 regarding development of GIN); *see also id.* at 962:8-10 (Court rejecting benefit and control  
 21 theory). This is insufficient as a matter of law for Finjan to show infringement by foreign users of  
 22 GIN such that Finjan may be awarded damages for foreign users. *See, e.g., Microsoft*, 550 at  
 23 444-45 (holding no infringement even though accused software “is designed, authored, and tested  
 24 at Microsoft’s Redmond, Washington, headquarters”).

25 Finjan asserts two system claims requiring a combination of hardware and software for  
 26 infringement. As Finjan argued to the Federal Circuit, the ’844 patent would be patent-ineligible  
 27 if they were directed to disembodied software. *See* Response Brief for Plaintiff-Appellee Finjan,  
 28 *Inc., Finjan, Inc. v. Blue Coat Sys., Inc.*, No. 2016-2520, Dkt. No. 41 at 25 (filed Jan. 30, 2017)

1 (“Independent Claim 15 adds *specific and concrete components* within an ‘inspector system,’  
 2 including a separate ‘*memory* storing a first rule set’ to be used by a ‘content inspection engine . .  
 3 . to generate a first Downloadable security profile.”) (emphasis added). Finjan made a similar  
 4 argument relating to the ’494 patent in its Opposition to Blue Coat’s Motion for Judgment on the  
 5 Pleadings Under 35 U.S.C. § 101. *See* Dkt. No. 109 at 11-12 (“Claim 10 [of the ’494 patent]  
 6 further avoids preemption by including additional *specific concrete components* contained within  
 7 a “system for managing Downloadables,” including “a *receiver* for receiving an incoming  
 8 Downloadable. . . The receiver is coupled to a “Downloadable Scanner” . . . the Downloadable  
 9 Scanner is coupled with a “database manager,” which is used for “storing the Downloadable  
 10 security profile data in a *database*.”). Finjan provided no evidence that GIN’s software is  
 11 combined with the required hardware in the United States. Rather, the uncontroverted evidence  
 12 presented to the jury established that foreign GIN users use hardware that is combined abroad  
 13 with software downloaded from the closest foreign data center. *See, e.g., id.* (Schoenfeld) at  
 14 1390:17-1401:14; JTX-3062. Accordingly, there can be no damages for foreign users.

## 15 **VIII. CONCLUSION**

16 For the reasons above, Blue Coat respectfully requests that the Court enter judgment as a  
 17 matter of law of noninfringement of the ’844 and ’494 patents. At a minimum, judgment as a  
 18 matter of law should be entered of no worldwide damages for the ’844 and ’494 patents.

19  
 20 Dated: December 8, 2017

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